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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 234

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the Appellate Court is published in abstract form only, in the official reports, *Cowher* v. *Pennsylvania Railroad Company*, 336 Ill. App. 308, 83 N. E. (2d) 359. The petition of the petitioner for leave to appeal to the Illinois Supreme Court was denied without opinion.[1]

[1] The full text of the opinion of the Appellate Court is found in the record. (R. 1-19.)

II.

JURISDICTION.

The respondent suggests that the court should deny certiorari for the reason that the trial in the state court resulting in a verdict of the jury finding the respondent not guilty, was in conformity with Federal statutory requirements, as construed by this court.

III.

QUESTIONS PRESENTED.

The ultimate issues presented by the record, are:

(a) Did the Illinois courts err in refusing to set aside the verdict of the jury finding the respondent not guilty, because of alleged errors in the admission or rejection of evidence of habit and custom tendered by petitioner; and incidentally, was the question of the admissibility of evidence a Federal or a State procedural question.

(b) Did the Illinois courts err in refusing to hold that there was prejudicial error in the refusal of the trial court to give an instruction tendered by the petitioner.

IV.

SUMMARY OF ARGUMENT.

(1.)

Summary Statement of the Issues.

(2.)

The Appellate Court correctly held that there was no prejudicial error in the admission of the undisputed evidence relating to the method of handling cars by the respondent in the classification yard from the hump to their destination on the various tracks.

(a) The petitioner is in no position to complain regarding the rejected evidence offered pertaining to habit and custom for the reason that the offered evidence was in fact incompetent in the form tendered, to prove such facts.

(3.)

The Illinois courts did not err in holding that the trial court correctly refused to give petitioner's tendered instruction.

(4.)

It was a question of fact whether the respondent was negligent in failing to furnish the petitioner a safe place in which to perform his work. The evidence on every material issue of this question preponderated heavily in favor of respondent. The Illinois courts did not err in refusing to set aside the verdict of the jury finding the respondent not guilty.

V.

RESPONDENT'S ADDITIONAL STATEMENT OF FACTS.

The petitioner, a brakeman, in the employ of the respondent was injured in its Altoona, Pennsylvania, Yards on February 1, 1945 at 11:55 P. M. (R. 76, 77), when he fell while alighting from a standing box car, after it had reached its destination and coupled onto a standing car. (R. 124, 125.)

The petitioner in his complaint charged that the respondent was negligent in failing to furnish him with a reasonably safe place to work. (R. 69.) The allegations of his complaint (R. 68, 69) and the evidence adduced at the trial show that petitioner based his case upon the alleged presence of ice and snow on the top of the box car in question; that the presence of such ice and snow, therefore made it an unsafe place for the petitioner to perform his work.

The petitioner also testified that the place where he stopped the car "was very dark. I could not see as the floodlights had been shut off." (R. 91.) All of the petitioner's co-employees appeared as witnesses for the respondent and disputed petitioner's testimony in this respect: (a) John W. Chatham, a conductor in charge of the classification yard at Altoona, (R. 257) and who was on duty at the hump (R. 262) that night from 11:00 P. M. to 7:00 A. M. (R. 262) said, (R. 260, 261) "As far as I could see the yard was illuminated by floodlights on the night of February 1, 1945"; (b) J. E. Makin, yardmaster, testified as to the location and power of the floodlights at the yard. (R. 265.) He said, (R. 266) "The lighting conditions in the Yard on the night of February 1, 1945

were that it was very light. All the lights were illuminated." He further testified that "The part of the Yard immediately west of the bridge (location of car in question) is illuminated. It was illuminated that night." (R. 266); (c) T. S. Norris, gang foreman in respondent's car inspection department, (R. 285) who inspected the top of the car immediately after the accident (R. 289), said, "The top of the car was well lighted on account of the floodlights above us, * * * The top of the house car was well lighted up—this particular car."; (d) J. E. Denning, a car inspector of this respondent, (R. 294) who made the inspection of the car in question with Mr. Norris, testified (R. 295), "I did see there was sufficient light there to note any difficulties on the car without use of the handlight."; (e) F. M. Mikusinski, an employee of the respondent whose duty it was to inspect and maintain the floodlights, at the Altoona Yard (R. 298, 299) testified concerning the location of the floodlights; that he was on duty until 9:00 or 10:00 o'clock on the night of February 1, and that none of the lights was out during the time he was there.

The petitioner testified that there was three inches of hard snow on top of the car; that there was a crust on it and that there were foot marks in that snow. (R. 90.) The petitioner also testified that one of the reasons why he slipped was because there was ice and snow around the grab iron on top of the car. (R. 92.)

The petitioner freely admitted that when he climbed on the car at the hump that he used the grab iron on the top of the car to reach the top of the car. In this respect he said (R. 124):

> "When I got on the top I got hold of the grab iron on the roof. I don't remember with which hand I grabbed it. I pulled myself up by means of the grab

iron. This grab iron is about 20 or 22 inches long and is made out of metal, about 5/8 inch metal. It stands about three inches above the car."

The petitioner further testified that after he reached the top of the car, "I stood on top of the car as it traveled for about ten car lengths, after I got off the ladder. Then I traveled about 25 car lengths while seated." (R. 124.)[1]

The petitioner was the only person who testified as to the presence of ice and snow on the top of the box car in question.

In his statement to the respondent, immediately following the accident, (Defendant's Exhibit 5, R. 268) he said:

> "Car stopped and in getting off car lost my hold, fell to six feet injuring left wrist."

No mention was made by the petitioner of the ice and snow on the top of the car in this report.

In his signed statement on February 13, 1945 (the accident happened on February 1, 1945) he said (Defendant's Exhibit 1, R. 283):

> "I went over the side ladder of the car and after descending down the ladder about two treads, my feet slipped off of the ladder and broke my hold on the car and I went down to the six foot."

The Appellate Court in this respect in its opinion said (R. 7, 8):

> "When plaintiff gave his statement immediately following the occurrence he said nothing about snow or ice being on top of the car or on the rungs of the ladder. About 12 days after the occurrence he signed another statement in which he attributed his mishap to the snow and ice on the car. The car upon which plaintiff rode and from which he fell had been picked up at Vandergrift at 1:25 A. M. and arrived at Al-

[1] On direct examination he testified that when he reached the top of the car he did not have any place to stand so he sat down. (R. 89.)

toona at 9:20 P. M. Vandergrift is situated about 250 miles east of Pittsburgh. There was no evidence to indicate that snow had fallen on the train as it proceeded westward to Altoona. Immediately following the occurrence an inspection of the car was made by defendant's car inspectors, T. S. Norris and P. E. Denning. The Witness Norris testified that a complete inspection of the car was made. *His report showed that there was no snow or ice on the roof.* Mr. Denning, who accompanied Norris, did not climb to the top of the car *but did examine the ladders on the sides of the car. He stated that there was no snow on them.* The car which plaintiff rode down the hump just before getting on the box car was free of snow and ice." (Emphasis supplied.)

The car on which petitioner claimed to have sustained his injury was Great Northern Box Car 33415. (R. 253.) This car was picked up at Vandergrift about 250 miles to the east of Pittsburgh. (R. 254.) The train left Vandergrift at 1:25 A. M. on February 1, 1945. Respondent's freight conductor Smith, said that he stayed with this train until he delivered the train and the car in question to respondent's Altoona Yard at 9:20 P. M. on February 1, 1945. (R. 254.) The conductor's report (Respondent's Exhibit 3) shows these facts. (R. 255, 256.) Smith further testified that he did not know the weather conditions that prevailed from the time he left Pittsburgh until the time "we delivered the train in the Altoona Yard." (R. 257.)

Respondent's conductor Chatham (R. 257) who was on duty at the Altoona Classification Yard at the hump in question, testified that he did not know when the petitioner boarded the car that night; that he did not see him get on the car; that he saw him on the car "when he came up past me." He further testified that he could not recall whether there was any snow on the roof of the car.

(R. 260.) He also testified that he did not recall the weather conditions that prevailed that night in the Altoona Yard. However, respondent's gang foreman Norris (R. 285) who inspected the car in question immediately after the occurrence testified (R. 286) that he found "nothing wrong with the car whatsoever"; that he made an inspection "all over the car, top and bottom, underneath and everything." He further said that, "I found the roof of the car free from anything and all the safety appliances were in first-class condition, the handhold, running board, etc. There was no ice and snow accumulated on the roof of the car." (See also, R. 291.)

Respondent's car inspector, Denning, (R. 294) who inspected this car with Norris, but did not go on the roof of the car, testified (R. 296) that he did not know what the roof of the car was like, but that there was no snow on the other parts of the car.

The petitioner testified that there was about six inches of snow on the ground; that it had a hard crust on it; that the snow had melted a few days before and had frozen again. He further testified that it had not been snowing "that day (referring to date of the accident) nor had it been snowing in Altoona for a couple of days previous to this time." (R. 88.)

Respondent's conductor in charge in the tower said that when the car came past him that the petitioner was on the car (R. 260); that he did not order the petitioner to get on the car (R. 260) as testified to by petitioner. (R. 88.) This conductor also testified that in handling cars over the hump it was the brakeman's duty to test the car to see if it was safe to ride before it was cut off; that before the car is cut off the brakeman tests the car to see if it is all right and until this is done, the car is not cutoff. (R. 263, 265.)

It is obvious that the controversial issue in this case was the question as to whether or not there was ice and snow on the car in question. It is further apparent that if the jury believed that there was no snow and ice on the car in question, that the petitioner had no cause of action. It is also apparent from the transcript of record that the jury accepted the version of the occurrence as testified to by respondent's witnesses, after hearing the evidence on the disputed questions of fact, (a) whether there was ice or snow on the top of the box car in question, and (b) whether the place where the petitioner alighted from the car in question was dark or well illuminated.

We will demonstrate in the argument to follow that all of the facts on this question were fairly and impartially submitted to the jury under proper instructions by the court.

VI.

ARGUMENT.

1.

Summary Statement of the Issues before the Illinois Courts.

In the present action the petitioner sought to recover damages for injuries alleged to have been sustained under the provisions of the Federal Employer's Liability Act.[1]

Trial was had under the Illinois procedure before a jury, which returned a verdict finding the respondent not guilty. (R. 71.)

The Illinois Appellate Court affirmed the judgment of the trial court entered on the verdict of the jury. Subsequently under Illinois procedure,[2] the petitioner filed

[1] 45 U. S. C. A. 51-60.
[2] Ill. Rev. Stats. 1947, Chap. 110, Par. 199.

his petition for leave to appeal to the Illinois Supreme Court. That court, after considering the petition filed by the petitioner, and the answer filed thereto by this respondent[3] denied the petition, making the judgment of the Appellate Court final.

The petitioner in his petition for writ of certiorari to this court reasserts in substance the grounds upon which he sought a review of the judgment of the Appellate Court in the Illinois Supreme Court, which were as follows (R. 20, 23):

> (a) That the Appellate Court misunderstood the issues in that the trial court improperly excluded evidence of habit and custom under which cars were handled at respondent's Altoona Classification Yard; that the court sustained objections to his attempts to prove these matters in the presence of the jury to the prejudice of the petitioner.
>
> (b) That the petitioner was prejudiced by the manner of the admission of certain evidence pertaining to respondent's habit and custom in the manner of handling its cars at its Altoona Classification Yard.
>
> (c) That the trial court erred in refusing to give a certain instruction tendered by the petitioner.

2.

The Appellate Court correctly held that there was no prejudicial error in the admission or rejection of the evidence.

The petitioner contends that the trial court erred in refusing to admit certain evidence offered by him to prove certain habits and customs of the respondent in the manner of handling of its cars at the Altoona Classification Yard.

The respondent submits that there is grave doubt whether rejection of the evidence in question raises a

[3] Not included in transcript of record.

Federal question under the Federal Employer's Liability Act,[1] but was merely a question of state procedure.[2]

If it be assumed that the question of the admissibility of the evidence of habit and custom raised a federal question, we shall demonstrate that there was no prejudicial error in this respect which entitled the petitioner to a reversal of the judgment entered on a verdict of the jury finding this respondent not guilty.

The petitioner particularly objects to the statement of the Appellate Court wherein that court in its opinion said (p. 23 of Pet.):

> "Nothing occurred *in the presence of the jury* that would suggest to the jury that the court considered proof of the custom not to be proper." (Emphasis in statement of petitioner.)

The petitioner points out several instances wherein certain offered evidence was rejected. In many instances the petitioner's attorney, himself, said *in the presence of the jury* that he would make an offer of proof of the rejected evidence (R. 81; R. 87; R. 97; R. 106; R. 109). The court did not comment or state at any time, in the presence of the jury, that proof of the custom sought to be established was inadmissible. It will be noted that the petitioner in each of the cited instances told the court *in the presence of the jury* that he would *make an offer of proof*. If any error occurred in the trial, in the respect mentioned, it was induced by counsel for petitioner repeatedly stating *in the*

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[1] 45 U. S. C. A. 51, 60.

[2] *Herb* v. *Pitcairn*, 324 U. S. 117, 120; cf. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 515; *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217 226; *Cook County* v. *Calumet & C. Canal & Dock Co.*, 138 U. S. 635. In the following states where this question has been considered, the courts have held that the admissibility of evidence is procedural and governed by state law: *Advance* v. *Thompson*, 320 Ill. App. 406, 418, rev. on other grounds, 387 Ill. 77; *Showalter* v. *Western Pac. R. R. Co.* (Cal.) 96 P. (2d) 964, sub. op 16 Cal. (2d) 460, 96 P. (2d) 895; *Joice V. Missouri-Kansas-Texas R. Co.*, 354 Mo. 439, 189 S. W. (2d) 568.

presence of the jury that he would *make "an offer of proof."*

As a matter of fact the court plainly told petitioner's counsel in chambers that he was sustaining the objections to the offered evidence (R. 97) "to the form and *not to the substance.*"

The petitioner asserts (p. 27 of his petition) that *all* of the evidence by which he offered to prove custom and usage was not subsequently received in evidence; that even the Appellate Court could only say, that "*substantially* all of the excluded evidence was later presented to the jury." He fails to point out, however, wherein the evidence was deficient in the respect mentioned.

An examination of the record shows without dispute that the statement of the Appellate Court, above referred to, is in accordance with the record (excluding from consideration petitioner's evidence on direct examination) (R. 57-58; R. 127; R. 261; R. 263, 264; R. 278; R. 280; R. 289; R. 298, 299).

All of which evidence, as the record shows, insofar as it pertained to the customs and usage of the respondent in handling cars at its Altoona classification yard, *was wholly undisputed.*

Under our subsequent proposition 3, we shall demonstrate that the evidence which the petitioner now contends was relevant to prove custom and usage, was in fact irrelevant and incompetent in form to prove such facts. We will also show that each specific series of questions propounded to the petitioner by his attorney, was in fact incompetent to prove any custom and usage. We shall also show, that as a matter of law, the petitioner could not have predicated a legal offer of proof upon the rejected evidence. Under these circumstances, the petitioner having

failed to conform to Illinois legal requirements in making his offer of proof cannot now complain that the court erred in rejecting such evidence.

In petitioner's offer of proof (R. 81) he contended in substance that if the petitioner had been allowed to answer the questions, he could establish the practice of handling cars found unsafe to ride. This practice (according to the petitioner) was, in substance, as follows: When the brakeman found a car unsafe to ride, he notified the pincutter and the pincutter would cut off a second car and tell him to get on the platform of that car. There was not one scintilla of evidence that a box car with snow and ice on top of the car, through custom and usage, or otherwise was considered an unsafe car.

The record shows without dispute that there was nothing defective with the braking apparatus of the car in question, or that the petitioner had any difficulty in stopping the car when it arrived at its destination. The petitioner testified that (R. 91): "After the car was at its destination, *I stopped the car;*" that "after the car had come to a complete stop and was coupled to another standing car, I started to get off. The car that I was coupled on to was a box car" (R. 124-125).

The Appellate Court in its opinion held that there was no evidence which tended to show, "the command or direction given by defendant's conductor to plaintiff to get up on the box car proximately contributed to cause his injuries." The Appellate Court also found that the petitioner did not contend in that court that the "presence of ice and snow is in and of itself any factual basis to support a jury's finding of negligence." It further said:

> "Looking at the facts in the light most favorable to plaintiff they show a direction to get on a car, which the plaintiff did without trouble. Since the

> presence of ice and snow was not negligence and since the original direction of the conductor did not embrace his descent in the manner in which he elected to descend, it cannot be said that the record contains any evidence which tends to show that the command given proximately contributed to cause plaintiff's injuries."

We submit that an analysis of the evidence appearing in the record amply supports the statement of the court in the respect mentioned.

The cases cited by the petitioner under this heading to sustain his contention that the proffered evidence was admissible under the pleadings, are not decisive of any controversial issue. These cases merely state the general rule of law (with which we agree) when proof of habit and custom is proper. The Appellate Court found that there was no dispute as to the custom and usage of the respondent in the handling of its cars at its Altoona classification yard on February 1, 1945.

There is, therefore, no merit to the contentions of the petitioner under his proposition I.

3.

The Appellate Court correctly held that there was no prejudicial error in the admission of the undisputed evidence relating to the method of handling cars by the respondent in its classification yard, from the hump to their destinations on the various tracks.

The petitioner contends under this heading that the court erred in rejecting certain evidence tendered by the petitioner in his case in chief, relating to method of handling the cars in the classification yards of the respondent.

Petitioner says that the court erred in rejecting this evidence (which he says was competent at the time it was

offered) to show the practice or custom of handling cars from the hump to the various classification tracks. He urges in substance that this error was not cured by the subsequent admission of the evidence, either by the defendant, or developed by petitioner's counsel in his cross-examination of defendant's witnesses.

Under this heading the petitioner cites numerous cases to sustain this contention. We have painstakingly examined each of the cited cases. It would serve no useful purpose to analyze each of these cases and to distinguish each case either on the facts or the law. We deem it sufficient to advise the court, that these cases do not reach the questions presently before the court in this petition. Petitioner's cited cases may be divided into three general classes. (a) Cases where the evidence was disputed or was the only evidence in the case on the question involved, (b) Cases in which the offered evidence was corroborative, and (c) Cases where the the offered evidence was cumulative.

The Appellate Court in its opinion considered these classes of cases (cited by petitioner) and held that where "the issues are contested on the proof, the exclusion of cumulative or corroborative evidence, cannot be cured by its subsequent reception." The Appellate Court in considering the classes of cases cited by the petitioner, also held in substance that this rule of law had no application where the evidence on the question of fact sought to be established *was undisputed* (as in the instant case). In pointing out this exception, after stating the rule of law referred to above, the Appellate Court said:

> "If, however, the **fact is not disputed**, the court's initial rejection of the evidence is corrected by the later proof of the **undisputed fact irrespective of the identity of the witness by whose testimony it is proved.**" (Emphasis supplied.)

The Appellate Court found as a fact that:

> "*There was no controversy as to the existence of the custom.* (Emphasis supplied by the court.) The jury could not have escaped believing that **which the defendant freely and unqualifiedly admitted.**" (Emphasis supplied.)

In addition to the cases cited by the Appellate Court in its opinion, to sustain this rule of law, the following Illinois cases might be added thereto: *Van Ameringen* v. *Cohen,* 254 Ill. App. 576, cert. den. 254 Ill. App. XIX; *Senquist* v. *Hardware Mutual Fire Ins. Co.,* 296 Ill. App. 510, 523, aff'd. 371 Ill. 360; *Andrews* v. *City of White Hall,* 184 Ill. App. 298, 302.

It has been unqualifiedly held in innumerable cases that the admission of erroneous or incompetent evidence is not reversible error, where the facts sought to be proven by such evidence, are *subsequently established by undisputed or uncontradicted evidence.*[1]

(a)

Petitioner's offered evidence to prove habit and custom was incompetent to prove such facts in the form tendered. The petitioner is therefore in no position to assert error in this respect.

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[1] *Neice* v. *Chicago & Alton R. R. Co.,* 254 Ill. 595, 605; *Suchomel* v. *Maxwell,* 240 Ill. 231, 235; *Soibel* v. *Oconto Co.,* 299 Ill. App. 518, 523; *Schillo* v. *City of Chicago,* 326 Ill. App. 423 (Abs.); *Eaton* v. *Thieme,* 15 Cal. App. (2d) 458, 59 P. (2d) 638; *Swarthout* v. *McDonald Mortgage & Realty Co.,* 102 Ind. App. 298, 199 N. E. 467; *Iterman* v. *Baker,* 214 Ind. 308, 15 N. E. (2d) 365; *Shortway Lines* v. *Sutton's Adm'r.,* 219 Ky. 541, 164 S. W. (2d) 809; *Keiger* v. *City of Faribault,* 220 Minn. 89, 18 N. W. (2d) 777; *Jansen* v. *Aholt* (Mo. App.) 189 S. W. (2d) 121; *Harden* v. *Kifer,* 188 Okla. 53, 111 P. (2d) 490; *Thomas* v. *Metropolitan Life Ins. Co.,* 131 Pa. Super 588, 200 A. 210; *Funderbunk* v. *Sovereign Camp W. O. W.,* 179 S. C. 80, 183 S. 462; *Grant* v. *Matson,* 68 S. D. 402, 3 N. W. (2d) 118; *Brotherhood of Loc. Firemen and Enginemen* v. *Raney* (Tex.) 101 S. W. (2d) 863. This appears to be the Federal rule. *William C. Barry Inc.* v. *Baker,* 82 F. (2d) 79; *U. S.* v. *Cole,* 45 F. (2d) 339; *Standard Oil* v. *Neville,* 48 F. (2d) 580; *Puget Sound Nav. Co.* v. *Lavender,* 160 F. 851.

There is, however, in our judgment a more cogent reason why the evidence was properly rejected by the trial court at the time it was offered.

The respondent in the Illinois Supreme Court in its answer to petitioner's petition for leave to appeal[2] to that court urged that petitioner's tendered evidence as to habit and custom did not comply with Illinois procedural requirements; that on such grounds the evidence was properly rejected in the trial court.[3] The Appellate Court in its opinion did not specifically refer to this question. However, this question was before the Illinois Supreme Court.[4]

The petitioner says that his purpose in offering this evidence was to establish the existence of a practice or custom at the particular classification yard to show the regular or usual method of handling the cars over the hump.

On pages 23, 24 of his petition, the petitioner lists alleged instances in which objections were sustained to offers of evidence to prove these facts. At another place in his petition (p. 35) he says the evidence was finally admitted "after being condemned *twelve times.*"

Petitioner's attorney was a capable and experienced trial lawyer. We have no doubt that he was fully cognizant of the rules of evidence requiring the proof of certain facts, in order that evidence of custom and usage be admissible. We also assume that he was cognizant of the Illinois rules of evidence relating to the manner of making an offer of proof.

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[2] Not included in the transcript of record.

[3] The trial court advised counsel for plaintiff that he was sustaining objections to the offered evidence "as to form and not as to substance." (R. 97.)

[4] On petition for leave to appeal the Illinois Supreme Court searches the entire record to determine if the judgment entered by the Appellate Court is justified by the record. In its review the Supreme Court is not confined to the grounds upon which the Appellate Court based its opinion (*Kamienski* v. *Bluebird Air Service*, 389 Ill. 462, 464).

The record shows that petitioner's counsel made five offers to prove certain facts, which he contended were relevant. The questions which he propounded to the witness (and to which objections were sustained), to establish custom and usage, were in fact incompetent and were erroneous as to form and substance. The court correctly, as a matter of law, sustained the respondent's objection to such questions, and to the alleged offers of proof based upon evidence sought to be adduced by such inquiries.

The Appellate Court in its opinion summarizes the facts which the petitioner contends he offered to prove. The petitioner says that he offered competent evidence to prove these facts, which was rejected by the trial court.

We will demonstrate by the record, that the petitioner did not offer any competent evidence to prove habit and custom, notwithstanding petitioner's assertions in his petition that the offered evidence tended to prove such facts.

Before adverting to the record, in this respect, the attention of the court is first directed to the fundamental Illinois rules of evidence relative to the facts necessary to be proved to establish a custom and usage.

The courts of Illinois have repeatedly held that before evidence of a custom or usage is admissible, certain facts must be shown to establish its existence. (a) It must be a *known custom,* (b) It must be *certain,* (c) It must be *uniform* in its application, and (d) It must have *existed for such a length of time so as to warrant the inference* that the party against whom the right was claimed had knowledge of it. (*Miller Agency Inc.* v. *Home Ins. Co.,* 276 Ill. App. 418; *Kneip* v. *Schroeder,* 166 Ill. App. 215; *Mobile Fruit Trading Co.* v. *J. H. Judy & Son,* 91 Ill. App. 87; *Quin* v. *Heihold,* 100 Ill. App. 320; *American Ins. Co.* v. *France,* 111 Ill. App. 310; *Wilson* v. *Bauman,* 80 Ill.

493; *Papin* v. *Goodrich*, 103 Ill. 86; *Turner* v. *Donovan*, 50 Ill. 85.)

In the *Miller* case (cited above, 276 Ill. App. 418) the court in discussing this question, said (p. 427):

> "A custom or usage to become binding upon the parties must have **antiquity**, as well as **uniformity** and **universality.**" (*Crawford* v. *Clark*, 15 Ill. App. 561.) (Emphasis supplied.)

We submit that an examination of the record clearly demonstrates that the series of questions which were propounded to the petitioner by his attorney, did not establish or tend to establish any facts which would show the existence of a custom or usage of the respondent.

Under the authorities cited above the petitioner should, first, have adduced evidence which would tend to show the existence of a custom and usage in Altoona classification yard on February 1, 1945.

While the petitioner contends that he made numerous offers of proof to establish such custom and usage, the record conclusively shows that he made only five such offers of proof.

The record shows that prior to the first offer of proof, the petitioner was asked the following questions by his counsel (R. 81):

> "Mr. Monek: **Have you ever ridden a car, gone to a brake platform and found the car unsafe to ride?**
> Mr. Costello: That is objected to.
> Mr. Monek: Let me finish my question please.
> Q. **Have you ever gotten on a car to ride it off the hump and found it unsafe to ride?**
> Mr. Costello: That is objected to.
> The Court: Objection sustained.
> The Witness: Yes.
> Mr. Monek: Your Honor, I am going to make an offer of proof. I offer to prove by this witness—"

The court will note that the petitioner was asked if *he* had ever "gotten on a car to ride it off the hump and found it to be unsafe to ride?"

What the petitioner had done in a particular instance did not tend to establish custom and usage for the reason that (a) it had no tendency to show that there was a custom and usage in existence at the particular hump, (b) such custom and usage had been in existence for any length of time; and (c) the respondent had notice of such custom.

It was incompetent to attempt to establish a custom and usage by showing what the petitioner had done on a particular occasion, as these facts (even if proved) did not tend to establish such custom.

In *C. C. C. & St. L. Ry. Co.* v. *Jenkins*, 174 Ill. 398, p. 407, the Supreme Court said:

> "To establish a usage or custom it is not sufficient to prove certain isolated instances. The usage must be positively established as a fact, and not left to be drawn as a matter of inference, from transactions. (27 Am. & Eng. Enc. of Law, p. 728.) A usage which is to govern a question of right should be so certain, uniform and notorious as probably to be known to and understood by the parties as entering into their contract, (*United States* v. *Duval, Gilp.* 336,) and cannot be proved by a single, isolated instance. (*Dean* v. *Swoop*, 2 Binn. 72; see, also, *Janney* v. *Boyd*, 30 Minn. 311; *Taylor* v. *Mueller*, id. 343). So, also, it is held that particular instances of a certain practice in a bank do not establish a usage, (*Allen* v. *Merchants' Nat. Bank*, 22 Wend. 215) nor instances in one or two banks other than the one concerned in the alleged usage. (*Chesapeake Bank* v. *Swain*, 29 Md. 501.) In *Herring* v. *Skagg*, 73 Ala. 446, it was held that a custom is a fact and is as capable of proof as any other fact; that it may be proved by evidence of facts and instances in which it has been acted upon, but is not proved by evidence that it was acted upon

in a few particular instances of dealing, nor is such evidence admissible to establish its existence."

On the second occasion the petitioner's counsel sought to establish custom and usage (so he says) by attempting to show how many cars the petitioner had ridden off the hump "at a time". In this instance the record shows the following (R. 87):

"**Mr. Monek: Mr. Cowher, in riding cars off the hump, how many cars do you ride at a time?**
Mr. Costello: That is objected—
The Witness: One, Two, Three.
Mr. Costello: I move the answer be stricken.
The Court: The answer may be stricken.
Mr. Monek: Your Honor, I will have to make another offer of proof."

For reasons shown above, this question was likewise objectionable as incompetent to establish, or tend to establish a custom and usage existing in the Altoona Pennsylvania yard of the respondent on February 1, 1945.

The record further shows that prior to the third offer of proof, the petitioner sought to prove the same facts which he attempted to prove by his second offer of proof R. 96, 97). In this respect the record shows as follows:

"Mr. Monek: **Have you ridden more than one car joined together off that hump?**
Mr. Costello: That is objected to.
The Witness: Yes.
The Court: Objection sustained.
Mr. Monek: Your Honor, I think that that is very material in this case.
The Court: That is a matter of opinion.
Mr. Monek: Mr. Cowher, would at times two or more cars go to the same destination in a yard?
The Witness: Yes.
The Court: Objection sustained.
Mr. Monek: Was there an objection?
Mr. Costello: Yes, there was an objection. It is the same thing all over again.

Mr. Monek: I think it is competent and I am going to try until it is ruled on.

The Court: I made my ruling to the form, not the substance.

Mr. Monek: I think I have a right to hear the basis of his objection.

The Court: You heard it.

Mr. Monek: I think I have a right to hear the basis of his objection.

The Court: You heard it.

Mr. Monek: I did not hear the basis.

Mr. Costello: It is the same objection I have been making right along.

The Court: The same matter that we discussed.

Mr. Monek: Well, I would like to make an offer of proof on that too."

Prior to his fourth offer of proof, petitioner's counsel asked petitioner the following questions (R. 106):

"Mr. Monek: Your Honor, I am trying to show what his occupation is so that the jury may determine whether or not he can return to work.

The Court: Go ahead.

Mr. Monek: I have to show how he sets brakes and gets on and off cars and the jury has a right to know so they can determine whether he can return to that type of work.

Mr. Costello: I object.

The Court: Objection sustained.

Mr. Monek: I would like to make an offer of proof on that."

The witness was permitted subsequently to testify as to what work he performed in connection with his duties. There could be no question, therefore, as to whether the court erred in the rejection of the offered evidence in this instance. In this respect the record shows as follows (R. 106):

"The Witness: In working as a switchman or brakeman, you throw switches, put on brakes, get on cars that are moving, get off cars that are mov-

ing. You have to climb up on box cars and apply the brake with your left hand, throw your weight against it and set the brakes. * * *"

The fifth offer of proof (R. 109) (in substance the same as the fourth offer of proof) was for the purpose of proving the physical strength required of a brakeman in the performance of his duties. The petitioner in this respect offered the following evidence (R. 108, 109):

"Mr. Monek: Now how many cars does a brakeman ride off the hump at various times?

The Witness: Well—

Mr. Costello: That is objected to.

The Court: Sustained.

Mr. Monek: Your honor, I want to show, I think it is important to show what type of work these brakemen have to do, how many cars they must ride down, so forth and so on, one or more coupled together and so forth and so on. I think that goes to the degree of strength required and so on and so forth.

The Court: Objection sustained.

Mr. Monek: Well, I would like to make an offer of proof on that particular phase then.

The Court: That you may."

The record shows (as we demonstrated above) the kind of work petitioner had to perform in connection with his duties. There could, therefore, be no error in the rejection of this offer.

The preliminary Illinois procedural requirements essential to make a valid offer of proof are well settled. The witness must be placed upon the stand and the examination conducted to a point where it is desired to offer the evidence upon the question and, "then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, **if he was not allowed to answer the question asked.**" (*Chicago City Rail-*

way Co. v. *Carroll,* 206 Ill. 318; *Whyte* v. *Rogers,* 303 Ill. App. 115; *Ritholtz* v. *Andert,* 306 Ill. App. 61.)

It is apparent, under the foregoing authorities, that if the questions propounded to the witness, to which an objection is sustained (prior to the making of the offer of proof), are incompetent or irrelevant; that a valid offer of proof cannot be predicated upon the action of the court in sustaining an objection to the irrelevant and incompetent evidence offered.

We have demonstrated above that all of the questions, in each instance, which petitioner's counsel propounded to the petitioner, were in fact incompetent to prove, and did not tend to prove, any element essential to establish a custom and usage on the part of the respondent.

It will also be noted from the record that the offers of proof made by the petitioner were offers to prove "*what the petitioner did*" at various times and under various circumstances. All of which, we have demonstrated above, did not tend to prove the existence of custom and usage.

The petitioner did not at any time ask the witness if there was a custom or usage in existence under which cars were handled at the Juniata hump, in the Altoona, Pennsylvania Yard of the respondent, on February 1, 1945.

If the petitioner had shown the existence of a custom, it would have been necessary for him to establish by further evidence that, (a), the custom was in existence on the day of the accident, and that (b) the respondent had notice of it. The record shows beyond dispute that the petitioner did not prove any of these essential facts. Neither did he make an offer to prove any such facts. For the reasons indicated the trial court properly rejected the offers of proof, in the form tendered by the petitioner.

The petitioner also suggests that the proof of habit and custom was vital to his theory of the case. This is a mere assertion, without any foundation in the record. The record shows that the petitioner rode the car in question to its destination and that it was coupled onto a standing car without any difficulty. The petitioner had he determined the car was unsafe to ride,[1] ordered it cut off and transferred to the side track, would have encountered the same identical hazards in alighting therefrom, that he did when he attempted to alight after the car had reached its final destination. The proof of habit and custom had no material bearing on the liability of this respondent.

Aside, however, from this view, all the material evidence as to respondent's method of the handling of the cars at the hump was before the jury, and it was not in dispute. The jury could not have been misled or prejudiced by the manner of the admission of such evidence.

It is further suggested that the decision of the Illinois courts on the admissibility of the evidence in question, or the manner in which it was admitted, rested on adequate and independent state grounds; that under such circumstances this court has said it will not review such question.[2]

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[1] The record contains no evidence which by inference or otherwise tended to show that a car with snow on the top was considered unsafe to ride. The petitioner does not assert that the car was mechanically defective in any respect.

[2] *Herb* v. *Pitcairn*, 324 U. S. 117, 125, and cases therein cited.

4.

The court did not commit error in refusing to give the instruction in question.

(a)

The petitioner contends that the court erred in refusing to give the following instruction (R. 307):

> "If you believe from a preponderance or greater weight of the evidence that the box car in question was at the time in question covered with snow and ice and that defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew or should have known, that its presence rendered it dangerous for a man to go upon and ride said car; and if you further find from a preponderance of the evidence that plaintiff went upon the box car in question in the course of his employment at the order and direction of defendant's conductor and that said conductor had authority to give such order and direction, if any; and if you further find and believe from the preponderance of the evidence that the accident and injury to the plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any, then you should consider *this* together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

The record shows that the petitioner tendered only four instructions, three of which were given by the court.

In petitioner's Given Instruction No. 15, (R. 309) the court instructed the jury that it was the duty of the defendant to exercise ordinary care to furnish the petitioner "a reasonably safe place in which to perform his work."

Petitioner's Given Instruction No. 23 (R. 309) was on the measure of petitioner's damages.

Petitioner's Given Instruction No. 23 (R. 309) authorized the jury to diminish petitioner's damages if it found he was guilty of contributory negligence.

The petitioner offered no instructions on the habit and custom of the railway company in handling of the cars in the switching operation. If he predicated his case on this theory he failed to tender any instruction in this respect.

The petitioner contends that the refused instruction quoted above, was a correct instruction and should have been given. He says this instruction was *approved* in *Berry* v. *Baltimore & O. R. R. Co.*, (Mo.) 43 S. W. (2d) 782.

However, assuming solely for the purpose of argument, that the tendered instruction in the *Berry* case was a correct statement of the law, as applied to the facts in that case, it does not follow, as petitioner urges, that his refused instruction was a correct statement of law, either under the facts in the instant case, or as a matter of law.

The instruction referred to in the *Berry* case (*Berry* v. *Baltimore & O. R. R. Co.* (Mo.), 43 S. W. (2d) 782), was as follows:

> "At the trial, the court overruled a demurrer to the evidence asked by the defendant and submitted the case to the jury on instructions covering the two grounds of negligence mentioned. The only instructions given for plaintiff, other than on the measure of damages, in addition to the formal parts and undisputed facts, required the jury to find 'that the defendant, by its agents and servants (other than the plaintiff) stopped said train near Xenia, Illinois, with the caboose thereof on a trestle, and that the step of said caboose extended out to about the edge of said trestle, so that a person alighting from said caboose would fall from said trestle down about twenty feet and sustain injuries, and that it was dark and

in the night-time; and if you further find that at the time and place where said caboose stopped on said trestle as aforesaid, if you do so find, plaintiff was in darkness of the night-time and did not know and had no means of ascertaining, if you do so find, that said caboose was on said trestle, and that thereafter the plaintiff was ordered and directed to alight from said caboose there, and did, pursuant to said order, step off said caboose and fall about twenty feet, sustaining injuries; and if you further find that the defendant, its agents and employes (other than plaintiff), in ordering plaintiff to alight from said caboose there, if you so find, failed to exercise ordinary care, and that said defendant, its agents and employes (other than plaintiff) knew, or by the exercise of ordinary care on their part would have known, of the aforesaid conditions, and that by reason thereof, if you so find, it was dangerous and not reasonably safe; and if you further find that the defendant, its agents and employes did cause and permit said caboose to stop on said trestle as aforesaid, and that they knew, or by the exercise of ordinary care on their part would have known, that by reason thereof it was likely to cause injuries to plaintiff as aforesaid and that it was dangerous and not reasonably safe, if you do so find; and if you further find that the defendant, its agents and employes (other than plaintiff) were guilty of negligence in stopping said caboose on said trestle as aforesaid, if you so find and in ordering plaintiff to alight from said caboose under the circumstances aforesaid, if you so find, and that plaintiff, while exercising ordinary care for his own safety, if you do so find, was injured as a direct and proximate result of the aforesaid negligence and carelessness on the part of the defendant, its agents and servants (other than plaintiff), then your verdict must be in favor of the plaintiff and against the defendant herein'."

An examination of petitioner's refused instruction shows that this instruction cannot be considered an "approved" instruction on the theory that it is the same or a similar instruction to that considered by the court in the *Berry* case, for the following reasons:

First—Petitioner's instruction is not the same, or even similar, to the instruction given in the *Berry* case.

Second—Petitioner's refused instruction was as a matter of law erroneous in many particulars, as we shall subsequently demonstrate.

Referring to the first of the above stated propositions, petitioner's refused instruction authorized the jury to find the defendant guilty of negligence if the presence of ice and snow on the car "rendered it *dangerous for a man to go upon and ride said car.*"

The petitioner did not charge in his complaint that the presence of ice and snow "rendered it *'dangerous'* for the plaintiff to go upon or ride the car".

The allegations of the petitioner's complaint with respect to the negligent acts charged against the respondent, were as follows (R. 69, Par. 8, Complaint of Petitioner):

"8. Defendant at the time and place alleged and wholly regardless of its duty toward the plaintiff committed one or more of the following acts of negligence and thereby caused the injuries to the plaintiff:

a) It unnecessarily permitted a great amount of snow and ice to be and to remain upon the grab irons and the top of said car where plaintiff had to work when it knew or in the exercise of ordinary care should have known that said ice and snow was there for a long time and that it would endanger plaintiff in the performance of his duties on said car.

b) It failed to use ordinary care to furnish plaintiff with a reasonably safe place in which to work.

c) It failed to use ordinary care to furnish the plaintiff with reasonably safe instrumentalities with which to work.

d) It negligently directed and ordered plaintiff to ride said car when it knew or in the exercise of ordinary care should have known that it was covered with snow and ice and that the presence of said snow and ice coupled with the absence of a

brake platform from which to operate said car increased the hazard and danger to the plaintiff in operating said car.

2) It failed to couple said car to another car with a brake platform from which plaintiff could have operated the hand brake and taken said car to its destination when it knew or in the exercise of ordinary care should have known that to require the plaintiff to operate the hand brake from the roof of said car when it was covered with ice and snow which increased the hazard to plaintiff would endanger his safety."

The complaint in the *Berry case*, in each of the two counts relied upon for recovery, charged the alleged acts of negligence, and also alleged under these conditions that, "it was *dangerous*, and not reasonably safe." It, therefore, appears that the use of the word "dangerous" in the instruction in the *Berry* case was authorized under the pleadings and proof in that case. Plaintiff's use of that word in the instruction under the pleadings and evidence made the instruction clearly erroneous.

The instruction in the *Berry* case after enumerating the facts under which the jury might find the defendant negligent, concluded with the following language:

> • • •" 'and that plaintiff, while exercising ordinary care for his own safety, if you do so find, was injured as a direct and proximate result of the aforesaid negligence and carelessness on the part of the defendant, its agents and servants (other than plaintiff), then your verdict must be in favor of the plaintiff and against the defendant herein.' "

Plaintiff's refused instruction, after enumerating six propositions (which we will later consider) concluded with this language (R. 308):

> • • • *"then you should consider* **this** together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

The plaintiff also omitted from his instruction the words, *"and not reasonably safe"* following the word *"dangerous"* which were included in the instruction in the *Berry* case.

The instruction in the *Berry* case (if it be assumed to be a correct statement of the law), was clearly a preemptory instruction, which apparently contained all the elements necessary to create legal liability on the part of the defendant in that case.

The petitioner in order to avoid the preemptory language of the instruction in the *Berry* case, merely told the jury it could consider "this, together with all of the facts and circumstances, etc."

It is clear beyond any possible logical argument that even if the instruction in the *Berry* case was an "approved" instruction, the petitioner is in no position to urge the correctness of the refused instruction on the basis of what was said in the *Berry* case. Petitioner's instruction was (a) an entirely different instruction, (b) the instruction in the *Berry* case was authorized under the pleadings and proof in that case; and (c) the instruction in the *Berry* case was based upon facts which were entirely different from the facts in this case.

The argument of the petitioner that he was entitled to give this instruction on the theory that the instruction was approved in the *Berry* case is clearly without merit.

(b)

The respondent as to the second of the above stated propositions, (that this instruction was erroneous as a matter of law), will demonstrate that the plaintiff was not entitled to give this instruction under any circumstances.

As we pointed out above the petitioner did not tender any instruction advising the jury as to issues in the case, or concerning the allegations of negligence charged in his complaint; that he tendered only four instructions, three of which were given at his request.

5.

The instruction was erroneous as a matter of law.

(i)

The instruction was unintelligible.

The refused instruction told the jury that if they believed "from a preponderance or greater weight of the evidence," six enumerated findings of fact, which were as follows:

(i) "that the box car in question was at the time in question covered with snow and ice,
(ii) and that defendant knew, or in the exercise of ordinary care should have known that the snow and ice, if any, was there and knew, or should have known that its presence rendered it dangerous for a man to go upon and ride said car;
(iii) and if you further find from the preponderance of the evidence that plaintiff went upon the box car in question in the course of his employment at the order and direction of defendant's conductor
(iv) and that said conductor had authority to give such order and direction, if any;
(v) and if you further find and believe from the preponderance of the evidence that the condition of said car by reason of the presence of the snow and ice, if any, was such that a reasonably prudent person in the position of said conductor would not have ordered plaintiff to go upon the car,
(vi) and if you further find from a preponderance or greater weight of the evidence that the accident and injury to the plaintiff was the direct and proximate result, in whole or in part, of obeying the conductor's order, if any,"

that they should "then consider *this* together with all of the facts and circumstances proved by a preponderance of the evidence in arriving at your verdict."

The word "this" has been defined by the court to be "a demonstrative word referring particularly to what is present or near in place, time or thought or **to something just mentioned**, or to be mentioned." (*People* v. *National Box Co.*, 248 Ill. 141.)

The word "this" used in the instruction could only refer to the sixth of the above enumerated findings which immediately preceded it.

Thus the instruction notwithstanding the six enumerated separate factual findings to be made by the jury directed the jury to consider only the sixth or last, of such findings in arriving at their verdict. The jury was thus left to speculate without any rule of law to guide them, as to what, if anything, they were to consider in connection with the remaining five findings. The instruction in the form tendered was therefore involved, misleading and unintelligible, and the court did not err in refusing this instruction.

It is never error to refuse an instruction which is both involved and misleading. (*Duncan* v. *Kammeier*, 206 Ill. App. 207; *Klusemeier* v. *East St. Louis Bridge Co.*, 210 Ill. App. 537; *Bourland* v. *Louisville & N. R. Co.*, 199 Ill. App. 126; *Conklin Const. Co.* v. *Walsh*, 131 Ill. App. 609; *Busick* v. *Ill. Central R. Co.*, 201 Ill. App. 63.)

(ii)

The use of the word "dangerous" in the instruction was in error.

The instruction purported to tell the jury that they might find that the presence of ice and snow on the top of the car, "rendered it *dangerous* for a man to go upon and ride said car"

This instruction limited the alleged negligence of the respondent to the alleged ice and snow on the top of the car which, "rendered it *dangerous* for a man to go upon and ride said car."

What conditions rendered the car "dangerous" was not defined by this instruction or by any other offered or refused instruction.

The petitioner says the respondent did not furnish him with a reasonably safe place to work, yet the Appellate Court found that the petitioner did not at any time contend "the presence of ice and snow is in itself a factual basis to support a jury's finding of negligence." The petitioner does not here challenge that finding. It is therefore difficult to understand how under such circumstances the mere presence of ice and snow authorized the jury to find its presence was "dangerous."

(iii)

The Appellate Court correctly found that the trial court did not commit error in refusing the instruction.

The Appellate court held the trial court did not err in refusing the instruction. In this connection that court said:

> "The instruction was properly refused on the further ground that there was no evidence which tended to show that the command or direction **given by defendant's conductor to plaintiff to get up on the box car proximately contributed to cause his injuries.** * * * There is no evidence to show that any circumstances or occurrences operated to cause plaintiff's injuries other than the ice on the grab iron and rungs. **It is not contended by plaintiff that the presence of ice and snow is in and of itself any factual basis to support a jury's finding of negligence.** Nor has plaintiff alleged or attempted to prove or argue that it was the duty of the defendant to remove the ice and snow from

the car. Looking at the facts in the light most favorable to plaintiff they show a direction to get on car, which plaintiff did without trouble. **Since the presence of the ice and snow was not negligence and since the original direction of the conductor did not embrace his descent in the manner in which he elected to descend, it cannot be said that the record contains any evidence which tends to show that the command given proximately contributed to cause plaintiff's injuries.** We are of the opinion that under the evidence presented the court properly refused to give the instruction." (Emphasis supplied.)

The foregoing statement demonstrates that the Appellate court did not err in affirming the action of the trial court in refusing petitioner's tendered instruction.

6.

It was a question of fact whether the respondent was negligent in failing to furnish the petitioner a safe place in which to perform his work. The evidence on every material issue of this question preponderated heavily in favor of this respondent. The Illinois courts, therefore, did not err in refusing to set aside the verdict of the jury finding the respondent not guilty.

As has been suggested above, the material issues in this case are divisible into two parts, i. e., (a) the major issue,—was there ice and snow on the car in question, and, (b) the supplemental issue,—was the place where the petitioner alighted from the car properly illuminated.

Without restating the record adverted to above, the evidence on these issues strongly preponderated in favor of the respondent. These facts the petitioner tacitly concedes by his failure to contend either before this court or the Illinois courts, that the verdict of not guilty, was against the manifest weight of the evidence.

All of the evidence on these material issues was before the jury for their consideration. These issues were questions of fact to be determined by the jury, based upon their judgment of the weight of the evidence and the credibility of the witnesses. This court has repeatedly held that under such circumstances it will not disturb the verdict of a jury.[1]

Conclusion.

We suggest that this case was fairly and impartially submitted to the jury without prejudicial error in the record in any of the respects suggested by petitioner.

We further respectfully suggest that there are no prejudicial errors of record in this case which would justify this court in granting certiorari prayed for by the petitioner. The jury saw and heard the witnesses, judged their credibility, the weight of the evidence, and returned a verdict for the respondent. The trial court approved this verdict and overruled petitioner's motion for a new trial.

Both the Appellate and Supreme courts approved the action of the trial court in this respect.

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[1] In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, this court said: (p. 35)

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing authorities.) That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh and set aside the jury verdict because the jury could have drawn different inferences or conclusions or because the judges felt that other results are more reasonable."

cf. *Lavender* v. *Kurn*, 327 U. S. 645, 652; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 652; *Myers* v. *Reading Co.*, 331 U. S. 477, 485; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62.

It is, therefore, respectfully suggested that the petition for writ of certiorari be denied.

Respectfully submitted,

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